A

DAMANSARA REALTY BHD

v.

BUNGSAR HILL HOLDINGS SDN BHD & ANOR

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02( )-5-2011 (W)]

C

11 OCTOBER 2011

CONTRACT: *Breach - Time of the essence - Property Development Agreement - Repudiation of - Appeal against - Plaintiff's development rights for 15 years - Failure of plaintiff to commence development for 13 ½ years - Whether performance be undertaken within reasonable time - Whether termination notice gives opportunity to rectify breaches - Whether court can imply time of the essence when contract did not expressly state it - Whether time of the essence specifically pleaded - Whether repudiation valid - Contracts Act 1950, ss. 47 & 56*

D

E

CONTRACT: *Repudiation - Delay in performance - Time of the essence - Property Development Agreement - Repudiation of - Appeal against - Plaintiff's development rights for 15 years - Failure of plaintiff to commence development for 13 ½ years - Whether performance be undertaken within reasonable time - Whether termination notice gives opportunity to rectify breaches - Whether court can imply time of the essence when contract did not expressly state so - Whether time of the essence specifically pleaded - Whether repudiation valid - Contracts Act 1950, ss. 47 & 56*

F

G

CONTRACT: *Time - Time of the essence - Property Development Agreement - Repudiation of - Appeal against - Plaintiff's development rights for 15 years - Failure of plaintiff to commence development for 13 ½ years - Whether performance be undertaken within reasonable time - Whether termination notice gives opportunity to rectify breaches - Whether court can imply time of the essence when contract did not expressly state it - Whether time of the essence specifically pleaded - Whether repudiation valid - Contracts Act 1950, ss. 47 & 56*

H

I

The plaintiff/appellant and the defendants/respondents had entered into a Property Development Agreement ('PDA') concerning 15.5 acres of land ('the development property') which belonged to the first defendant. Under the said PDA, the plaintiff was given development rights over the development property for 15 years. Upon execution of the PDA, the plaintiff did not make any effort to commence development on the development property. As a consequence, the defendants issued a termination notice to the plaintiff repudiating the PDA. The said termination notice was issued some 13 ½ years into the subsistence of the PDA which brings to the gist of the dispute between the parties as to whether (i) the plaintiff was required to continuously develop the development property over the span of 15 years or (ii) the plaintiff was at liberty to commence development as and when it felt the time was right so long as it had commenced work within the 15 years period. The plaintiff commenced an action against the defendants for the wrongful repudiation of the PDA wherein their action was dismissed by the High Court and the said decision was upheld by the Court of Appeal. The plaintiff appealed to this court wherein leave was granted to appeal based on the following questions, *ie*, (a) whether the termination clause in one of the interlocking agreements which was contemporaneously executed be invoked without regard to performance under the other agreements; (b) whether by virtue of s. 56(2) of the Contracts Act 1950 ('the Act'), a contract could be terminated for alleged delay where time was not made of the essence; (c) whether by reason of s. 47 of the Act, the common law rule that a performance under a contract must be undertaken within a reasonable time was ousted when the parties had themselves specified time for performance; (d) whether a termination notice that entitles a party to the contract, an opportunity to rectify the breaches complained of was valid in law when no such opportunity was afforded; (e) whether the court may imply a term in the contract making time for performance the essence when the contract did not expressly state the same and the duration for the contract was expressly stipulated; and (f) whether reliance on an implied term as to time of performance should be specifically pleaded where it was raised as a defence to a claim for specific performance.

A B C D E F G H I

Held (dismissing the appeal with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The general rule is that where several deeds are executed at the same time, reference should be made to all the deeds to ascertain the intention of the parties (*Mohamed Isa v. Abdul Karim*; refd). In the instant case, the agreements may have been connected to each other but together, they do not form a single transaction. Although the PDA may be regarded as an ancillary agreement, it did not mean that it could not be construed as a separate stand-alone agreement. Nothing was shown that the agreements were so interlocked that if default was made of either, the other cannot be enforceable by the other side. As such, the agreements, though related, were separate and not interlocked. (paras 18, 20 & 23)

(2) Whether or not time had been intended to be of essence would depend on the conduct and dealings of the parties. There was no necessity in law that a clause making time of the essence must be expressed in any given contract. It is trite that there is a *prima facie* acceptance that in commercial contracts, time would be of the essence. (paras 25 & 31)

(3) Though the PDA did not expressly state that time was of the essence, it was implicit in the PDA that time was of the essence for the development to be commenced and completed within the 15 year period though it did not set out in detail the stages in which the development was to be progressed upon. Besides, even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By its failure to commence any development activity for 13 ½ years, the plaintiff was guilty of having breached the PDA. Thus, the defendants were entitled to terminate the PDA. (Contracts Act 1950, ss. 47 & 56) (paras 32 & 41)

(4) The clause in the PDA did not create any obligation or duty for the defendants to issue a notice to the plaintiff to rectify any material breach before the termination notice could be issued. The defendants had acted in line with the PDA wherein they did not seek to terminate the PDA immediately but chose to state that the PDA would be terminated upon the expiration of 30 days. Thus, the termination notice was valid in law. (para 46)

(5) The defendants had sufficiently pleaded that time was of essence in the performance of the PDA. There was no legal requirement to plead the exact words saying that time was of essence of the contract. As long as the innocent party had raised matters or facts which sufficiently showed that time was of the essence that would be sufficient for the purpose of pleadings. The plaintiff was not in any way taken by surprise or prejudiced by the omission of the defendants to have pleaded the exact words. (paras 51, 52, 53 & 54)

(6) The plaintiff's prolonged and unreasonable delay was the one that frustrated the commercial adventure entered into by the parties thus enabling the contract to be repudiated. Such delay showed that the plaintiff had either refused to perform or disabled itself from performing its promise in its entirety. (paras 68 & 69)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu dan defendan-defendan/responden-responden telah memasuki satu Perjanjian Pembangunan Hartanah ('PDA') berkenaan 15.5 ekar tanah ('hartanah pembangunan') yang dimiliki oleh defendan pertama. Di bawah PDA tersebut, plaintif telah diberikan hak pembangunan terhadap hartanah pembangunan untuk 15 tahun. Setelah PDA dilaksanakan, plaintif tidak mengambil sebarang langkah untuk memulakan pembangunan di atas hartanah pembangunan. Akibatnya, defendan-defendan telah memberikan satu notis penamatan kepada plaintif bagi membatalkan PDA. Notis penamatan tersebut telah diberikan kira-kira 13 ½ tahun dalam penguatkuasaan PDA yang membawa kepada intipati pertikaian di antara pihak-pihak, iaitu sama ada (i) plaintif perlu meneruskan pembangunan dalam tempoh 15 tahun atau (ii) plaintif mempunyai kebebasan untuk memulakan pembangunan bila ia rasa masa adalah betul selagi kerja telah dimulakan dalam masa 15 tahun. Plaintif telah memulakan tindakan terhadap defendan-denfendan untuk pembatalan salah PDA di mana tindakannya telah ditolak oleh Mahkamah Tinggi dan keputusan tersebut telah disokong oleh Mahkamah Rayuan. Plaintif telah merayu ke mahkamah ini di mana kebenaran merayu telah dibenarkan berasaskan soalan-soalan berikut, iaitu, (a) sama ada klausa pembatalan di dalam salah satu daripada perjanjian bercantum yang telah dilaksanakan bersama dibangkitkan tanpa menghiraukan pelaksanaan di bawah perjanjian-perjanjian lain; (b)

A sama ada menurut s. 56(2) Akta Kontrak 1950 ('Akta tersebut'), kontrak boleh ditamatkan bagi kelewatan yang didakwa di mana masa bukanlah intipati kontrak; (c) sama ada mengikut s. 47 Akta, kanun common law bahawa pelaksanaan di bawah kontrak perlu dilaksanakan dalam masa yang munasabah telah disingkirkan apabila B pihak-pihak dengan sendiri telah menetapkan masa untuk pelaksanaan; (d) sama ada notis penamatan yang memberikan salah satu pihak kepada kontrak peluang untuk membetulkan pelanggaran-pelanggaran yang diadukan adalah sah di sisi undang-undang apabila peluang sebegitu tidak diberikan; (e) sama ada C mahkamah boleh menganggap salah satu terma di dalam kontrak yang menjadikan masa untuk pelaksanaan intipati perjanjian apabila kontrak tersebut tidak menyatakannya dengan jelas dan tempoh masa bagi kontrak telah dinyatakan dengan jelas dan (f) sama ada pergantungan terhadap terma tersirat berkenaan masa pelaksanaan D perlu diplid dengan spesifik di mana ianya telah dibangkitkan sebagai pembelaan bagi pelaksanaan spesifik.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

E **Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:**

(1) Kaedah am undang-undang adalah di mana terdapat beberapa suratikatan-suratikatan yang dilaksanakan pada masa yang sama, rujukan perlu dibuat kepada kesemua suratikatan- F suratikatan tersebut bagi menentukan niat pihak-pihak (*Mohamed Isa v. Abdul Karim*; dirujuk). Dalam kes ini, perjanjian-perjanjian mungkin berkaitan antara satu sama lain tetapi bersama, mereka tidak membentuk satu transaksi. Walau pun PDA boleh dianggap sebagai perjanjian sampingan, ianya G tidak bermakna bahawa ia tidak boleh ditafsirkan sebagai satu perjanjian berasingan dengan sendirinya. Tiada apa-apa yang ditunjukkan bahawa perjanjian-perjanjian begitu bercantum di mana jika salah satu diingkari, lagi satu tidak boleh dikuatkuasakan oleh yang lain. Oleh itu, perjanjian-perjanjian, H walau pun berkaitan, adalah berasingan dan tidak bercantum.

(2) Sama ada masa telah diniatkan untuk dijadikan intipati kontrak bergantung kepada kelakuan dan urusan-urusan pihak-pihak. Tiada keperluan dalam undang-undang bahawa klausa yang I menjadikan masa sebagai intipati kontrak mesti dinyatakan

dengan jelas di dalam mana-mana kontrak. Adalah mantap terdapatnya penerimaan *prima facie* bahawa dalam kontrak komersial, masa akan menjadi intipati kontrak. A

(3) Walau pun PDA tidak menyatakan dengan jelas bahawa masa adalah intipati kontrak, adalah tersirat dalam PDA bahawa masa adalah intipati kontrak supaya pembangunan dimulakan dan disiapkan dalam masa 15 tahun walau pun ianya tidak dinyatakan dengan terperinci peringkat-peringkat di mana pembangunan adalah untuk dimajukan. Di samping itu, walau pun masa adalah besar, adalah kewajipan plaintif untuk memulakan kerja dalam masa yang munasabah. Disebabkan kegagalannya memulakan aktiviti pembangunan untuk 13 ½ tahun, plaintif adalah bersalah dalam melanggarkan PDA. Oleh itu, defendan-defendan berhak menamatkan PDA. (Akta Kontrak 1950, ss. 47 & 56) B C D

(4) Klausa di dalam PDA tidak mewujudkan sebarang obligasi atau kewajipan kepada defendan-defendan untuk mengeluarkan notis kepada plaintif untuk membetulkan sebarang pelanggaran material sebelum notis penamatan boleh dikeluarkan. Defendan-defendan telah bertindak selaras dengan PDA di mana mereka tidak menamatkan PDA dengan segera tetapi memilih untuk menyatakan bahawa PDA akan ditamatkan apabila habis tempoh 30 hari. Oleh itu, notis penamatan adalah sah di undang-undang. E F

(5) Defendan-defendan telah dengan memadai memplid bahawa masa adalah intipati kontrak dalam pelaksanaan PDA. Tiada keperluan undang-undang untuk plid perkataan-perkataan tepat yang menyatakan masa adalah intipati kontrak. Selagi pihak yang tidak bersalah telah membangkitkan perkara-perkara atau fakta-fakta yang menunjukkan dengan memadai bahawa masa adalah intipati kontrak, ianya adalah mencukupi bagi tujuan pliding. Plaintif tidak dalam apa jua keadaan terkejut atau diprejudis oleh pengabaian defendan-defendan untuk memplid perkataan-perkataan tepat. G H

(6) Kelewatan tidak munasabah dan berpanjangan plaintif telah mengecewakan pengembaraan komersial yang telah dimasuki oleh pihak-pihak menyebabkan kontrak ditolak. Kelewatan sebegitu menunjukkan bahawa plaintif telah sama ada enggan untuk melaksanakan atau menghalang dirinya daripada melaksanakan janjinya secara keseluruhan. I

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Bradley v. Newsom Sons & Co [1919] AC 16 ***(refd)***

Bunge Corp v. Tradax Export SA [1981] 2 All ER 513 ***(refd)***

Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1988] 1 LNS 213 HC ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2009] 9 CLJ 317 HC ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 4 CLJ 16 CA ***(refd)***

Dr Parmanand v. District Board, Patna AIR [1962] Pat 452 ***(refd)***

Frost v. Knight [1872] LR 7 Ex 111 ***(refd)***

Himatsing & Co v. PR Joitaram [1970] 1 LNS 37 ***(refd)***

Law Ngei Ung & Anor v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC ***(refd)***

Mannai Investments Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***

Manks v. Whiteley [1912] 1 Ch 735 ***(refd)***

Mohammed Ibrahim & Anor v. Mohammed Abdul Razzak AIR [2007] AP 294 ***(refd)***

Mohamed Isa & Ors v. Abdul Karim & Ors [1970] 1 LNS 82 HC ***(refd)***

Paul v. IRC [1936] SC 443 ***(refd)***

Prudential Assurance Co Ltd v. IRC [1993] 1 All ER 211 ***(refd)***

Ranieri v. Miles & Anor [1980] 2 All ER 145 ***(refd)***

Sat Parkash L Tara Chand v. Dr Bodh Raj L. Bhagwan Das Khatri AIR [1958] Pun 111 ***(refd)***

Stickney v. Keeble [1915] AC 386 ***(refd)***

Superintendent of Lands and Surveys, (4th Division) & Anor v. Hamit Matusin & 6 Ors [1994] 3 CLJ 567 SC ***(refd)***

Swarnam Ramachandran v. Jayapalan [2004] 8 SCC 689 ***(refd)***

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor [2011] 1 CLJ 51 ***(refd)***

Unitramp SA v. Garnac Grain Co Inc (The Hermine) [1979] 1 Lloyd's Rep 212 ***(refd)***

Universal Cargo Carriers Corpn v. Citati [1957] 2 All ER 70 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 47, 56(1), (2)

Contracts Act 1872 [Ind], s. 46

Other source(s) referred to;

Cheong May Fong, *Civil Remedies in Malaysia,* Sweet & Maxwell Asia, 2007, p 38

Cheshire, Fifoot and Furmston's Law of Contract, 15th edn, Oxford University Press, p 681

For the appellant - Dato' Cyrus Das (Alex De Silva & S Shamala with him); M/s Bodipalar Ponnudurai De Silva

For the respondents - Tommy Thomas (Alan Adrian Gomez with him); M/s Tommy Thomas

[Appeal from Court of Appeal; Civil Appeal No: W-02-1208-09]

[Editor's note: For the Court of Appeal judgment, please see Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 4 CLJ 16.]

Reported by Kumitha Abdul Majid

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] On 26 January 2011, leave was granted to appeal against the decision of the Court of Appeal given on 29 October 2009. Six questions were posed for our consideration. We heard the appeal on 14 June 2011. We reserved our decision to consider the points raised by the parties. We now give our judgment.

[2] For convenience, in this judgment the appellant is referred to as the plaintiff and the respondents collectively as the defendants. Where necessary the defendants will respectively be referred to as either the first defendant or the second defendant.

[3] In coming to its decision, the Court of Appeal by majority upheld the judgment of the High Court given on 22 June 2009 dismissing the action of the plaintiff.

[4] For the reasons given below, we dismiss this appeal with costs. We uphold the decision of the learned High Court Judge as affirmed by the majority in the Court of Appeal that the defendants were justified in terminating the contract.

A **Brief Background Facts**

[5] The courts below have thoroughly dealt with the facts in this case. (See: [2009] 9 CLJ 317 HC and [2011] 4 CLJ 16 CA). Hence, we need only to highlight the relevant and pertinent facts
B for the purposes of this appeal.

[6] An agreement termed as the Property Development Agreement ("PDA") was entered into by the parties concerning 15.5 acres of land ("the Development Property") located in Damansara Heights. It is not in doubt that the Development
C Property belongs to the first defendant. Under the said PDA, the plaintiff was given development rights over the Development Property for fifteen (15) years, commencing from 4 July 1994. It is common ground that the plaintiff does not have any interest in the land, be it legal or equitable. All the plaintiff had over the
D property was development rights.

[7] Upon the execution of the PDA, the plaintiff did not make any effort to commence development on the Development Property. It is not in doubt that the plaintiff failed to take any
E proactive measure to develop the said land. In consequence, by letter dated 25 October 2007, the defendants issued a termination notice to the plaintiff, citing the latter's failure to develop the Development Property as a material breach under the PDA and/ or a repudiation of the same. As such, it was declared that the
F PDA would effectively terminate on 25 November 2007. It is not in doubt that the termination notice was issued some thirteen and a half (13 1/2) years into the subsistence of the PDA.

[8] The gist of the dispute between the parties is this – whether
G the plaintiff was required to continuously develop the Development Property over the span of fifteen years or whether the plaintiff was at liberty to commence development as and when it felt the time was right so long as it had commenced work within the 15 years period. It is to be noted that only upon service of the termination
H notice did the plaintiff take some steps towards initiating the development works. However, these efforts did not eventually materialize.

[9] The plaintiff commenced an action against the defendants for
I wrongful repudiation. The High Court dismissed the action. The learned High Court Judge, having carefully scrutinized the PDA, found, *inter alia*, that as the PDA was a commercial contract, it

ought to be construed in a commercially sensible manner which the parties all along intended for time to be of the essence. As such, in his view, it was reasonable to assume that the parties intended to have the whole Development Property land developed within the time period of fifteen years. The learned High Court judge did not think that the PDA intended to give the plaintiff the liberty to commence development at the tail end of the fifteen year period.

[10] The learned High Court Judge also made a finding of fact that efforts to develop the Development Property were only made upon the issuance of the termination notice by the defendants and nothing of that sort was done thirteen years prior to that. Hence, the learned High Court Judge took the view that the plaintiff could not insist on holding on to the remaining nineteen months of its development rights simply because the delay on the plaintiff's part was so prolonged that it justified the defendants to terminate the PDA.

[11] In upholding the judgment of the learned High Court Judge, the majority in the Court of Appeal was of the view that the learned High Court Judge was right in arriving at his conclusion. The majority agreed that the PDA being a commercial contract must be construed in a commercially sensible manner. The majority also opined that the PDA did not merely impose an obligation for the plaintiff to commence development by applying and obtaining a Development Order but to actually undertake and complete the development on the Development Property within the said fifteen years period. Thus, as time was of the essence of the PDA, the plaintiff was not at liberty to commence development at its own leisure.

[12] Thus, the majority in the Court of Appeal concluded from a legal stand point that the defendants were entitled at law to terminate the PDA and need not have waited for the expiration of the fifteen years period. The plaintiff clearly by its conduct was in breach of the PDA. The majority also rejected the plaintiff's contention that it would be entitled to a three years extension if the Development Order had been granted by the authorities. The majority found that there was no automatic extension under the PDA, that to adopt such an interpretation would not be commercially sensible, that such an interpretation would be

A contrary to the implied term that time was of the essence of the contract, and it was not possible for a project of such a magnitude to be completed within a three years period.

[13] The minority view in the Court of Appeal held that time was B not of the essence under the PDA because the plaintiff had been given fifteen years to develop the Development Property. There was no time set for the plaintiff to perform its obligation and there was no requirement for the plaintiff to commence development within a reasonable time. In coming to such a view, the minority C took the view that such a termination could only be justified under the doctrine of anticipatory breach. However, no such circumstances existed in the present case because the plaintiff had not indicated by its words or conduct that it would not be able to perform its obligation at the expiration of the said period. The D minority was also of the view that the plaintiff was entitled to develop only part of the land and was not obligated to develop the whole land. Accordingly, the minority concluded that since the time period was still in existence, the defendants' termination was premature and unjustified.

E

Leave Questions

[14] We shall now proceed to deal with the leave questions. Leave was granted for the following six (6) Questions:

F (1) Where interlocking agreements are contemporaneously executed, can the termination clause in one of them be invoked without regard to performance under the other agreements, where each was executed on the faith of the others being executed, and was a consideration for the same?

G (2) Whether by reason of the limitation under Section 56(2) of the Contracts Act 1950, a contracting party could terminate a contract during the life of the contract for alleged delay where time is not made of the essence?

(3) Whether by reason of Section 47 of the Contracts Act 1950, H the common law rule that performance under a contract must be undertaken within a reasonable time is ousted where the parties have themselves specified time for performance?

(4) Whether a notice to terminate a contract issued by one party I to a contract pursuant to a clause that entitles the other party to the contract an opportunity to rectify the breaches complained of is valid in law when no such opportunity is afforded to the other party?

(5) Whether on a true construction of Sections 47 and 56 of the Contracts Act 1950, the Court may imply a term making time for performance of the contract of the essence where the contract does not expressly make time of the essence and the duration for the contract is expressly stipulated?

(6) Whether reliance on an implied term as to time of performance should be specifically pleaded where it is raised as a defence to a claim for specific performance?

Question 1 – Interlocking Agreements

[15] The crux of the plaintiff's argument is that the courts below fell into error by construing the PDA as a stand-alone agreement. Counsel for plaintiff submitted that there were four Agreements executed on the same date (7th January 1993) namely the Main Agreement, the New Property Development Agreement, the Property Sales Agreement and the PDA. It was therefore contended by the learned counsel that the four agreements were interlocking in nature and ought to be considered as a whole. In other words, none of the said agreements could be considered in isolation. And he pointed out that a close scrutiny of all four agreements would show the commercial intention behind the bargain of the parties which was that the plaintiff had bought the right to remain on the subject land and develop the whole or any part of the land at its own pace and discretion. It was also emphasized that the plaintiff had in fact performed its obligations under the other agreements such as the payments of RM40 million. Such payment should be taken into account as consideration since all the four agreements were interlocked.

[16] In response, learned counsel for the defendants raised two points. First, he argued that the remaining Agreements were not part of the issues to be tried before the High Court. As such the trial proceeded without any reference to the interlocking nature of the said agreements. Second, it was contended that each of the said agreements should be considered on its own merit. The clauses are distinct and even the parties are different. As such, learned counsel contended that the plaintiff's argument of the PDA being subjected and confined to the other agreements could not be in countenance with the law of contract.

[17] We think there is basis for raising the first point. The argument on the agreements being interlocked was not before the courts below. Thus, it is quite unfair to now say that the courts below erred in construing them as they did. Ordinarily we would have precluded the plaintiff from formulating such argument but Question 1 was allowed when leave was granted. In fact Question 1 presupposes that the agreements are interlocked when there was no such finding of fact made in the courts below.

[18] In any event, we do not think it is in dispute in that the general rule is that where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties. (See: *Manks v. Whiteley* [1912] 1 Ch 735; [1914] AC 132 and *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] 1 LNS 82 HC).

[19] However, in this case upon construing all the four Agreements as a whole we are not persuaded by the argument advanced for the plaintiff. We are of the view that the interpretation preferred by the plaintiff does not make any commercial sense. In *Mannai Investments Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 it was said that in 'determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them'.

[20] The four agreements may have connection to each other. However, we do not think together they form a single transaction. They may seek to achieve a certain goal, ie, a common end result, but it does not mean they must necessarily be invoked together to achieve the goal. Equally the combined effect of several separate transactions arising from each of the agreements could achieve the desired end result. The test therefore, is whether a particular agreement out of several agreements executed at the same time can be viewed as a separate transaction or whether it must be taken to be part of one transaction. And although the PDA may be regarded as an ancillary agreement it does not, in our view, mean that it cannot be construed as a separate stand-alone agreement.

[21] The foregoing approach is not without precedent. In *Prudential Assurance Co Ltd v. IRC* [1993] 1 All ER 211 Sir Donald Nicholls V-C was faced with three separate agreements executed on the same date. The first was an agreement to purchase a freehold property. The second was an elaborate agreement for development. The third was an agreement for transfer of the land. In addressing the issue His Lordship, *inter alia*, said this at page 217:

> In the present case the sale agreement and the development agreement and, indeed, the transfer were all part of one transaction in the sense that together they comprised a single package or bargain. They were all executed on the same day and, no doubt, all three were executed simultaneously. Clearly the end result intended by the parties was that the land, previously belonging to the developers, would become the property of the taxpayer company together with the new buildings being constructed by the developers. The commercial object of the transaction was that the taxpayer company would acquire a development being carried out for it by the developers with funds provided by the taxpayer company.
>
> However, I am unable to characterise the transaction by which that end result was sought to be achieved as a sale of the land with finished buildings thereon. That, manifestly, was not the legal shape of this transaction. The sale agreement was, as the parties intended, completed independently of the carrying out of the building works under the development agreement.

[22] It is interesting to note that in *Prudential Assurance (supra)* reference was made to the decision in *Paul v. IRC* [1936] SC 443 where Lord President Normand observed thus:

> While the question is, in the sense which I have described, one of fact, there must be materials from which the inference can be drawn that the two contracts, one of feu and the other for building, in reality embody one bargain. Before that inference can legitimately be drawn, it is necessary that the facts should establish, first, that the superior and the building contractor were one and the same person, or that the one was the agent or the nominee of the other; and secondly, that the contracts are so interlocked that, if default is made on either, the other is not enforceable by either side.

[23] Hence, in this case, to accede to the plaintiff's contention would actually alter the legal shape of the end result which the parties had intended way back in 1993. Furthermore, there is

A insufficient materials before this court (and as in the courts below) to arrive at the inference that all the said agreements in reality embody one bargain. In fact, nothing is shown that the agreements are so interlocked that if default is made of either, the other cannot be enforceable by the other side. As such, in our B view, the said four agreements, though related, are separate and not interlocked. And it follows that in view of our conclusion the payment of RM40 million submitted by learned counsel for the plaintiff as being evidence of part performance of the obligations under the Agreements is irrelevant to the issues for our C consideration in this appeal.

[24] It follows that there is nothing to preclude the exercise of the termination clause (cl. 16) as found in the PDA.

D **Question 2**

Effect Of s. 56(2) Of The Contracts Act 1950

[25] Question 2 implies that it is a principle of law that in order for time to be of the essence it must be stipulated in a given E contract. With respect, such an impression, whether intended or otherwise, is erroneous. On the contrary, it is trite law that a contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be read along with other provisions of the contract to F determine if time is truly of the essence of the contract'. (See: *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269.) Thus, whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of G the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not *ipso facto* result in time being of the essence.

[26] In the case of *Mohammed Ibrahim & Anor v. Mohammed* H *Abdul Razzak* AIR [2007] AP 294 the High Court of India observed that "it is settled law, merely because there is a mention in the agreement making time as essence of the contract, it does not mean that such time is made an essence of the contract. The court has to decide the same while taking into consideration the I intention of parties in making such a stipulation, their conduct and surrounding circumstances".

[27] It follows that the absence of such a clause does not *per se* mean that the parties did not intend for time to be of the essence. In *Ranieri v. Miles & Anor* [1980] 2 All ER 145 Lord Edmund-Davies in his speech rejected an assertion that in the absence of a clause stating that time was of the essence, the law regards the contract as unbroken provided that defaulting party performs its obligation within a reasonable time from the due date.

[28] We are of course conscious that in any given contract where time is not of the essence, whether express or implied, then s. 56(2) is relevant. In such case the innocent party is not entitled to terminate the contract and is only entitled to damages. It is under s. 56(1) where time is of the essence that the innocent party may exercise its right to terminate the contract.

[29] The distinction between the two sub-sections of s. 56 has been succinctly explained by Cheong May Fong in *Civil Remedies in Malaysia, Sweet & Maxwell Asia*, 2007, at p. 38 where the learned author said the following:

> In both s. 56(1) and 56(2), a specified date is fixed for performance. However, under s 56(1), there is an intention that time should be of the essence of the contract but there is no similar intention under s. 56(2). Thus, the effect of a breach to perform at the time stipulated under s. 56(1) where time is of the essence cause the contract to be voidable and gives the innocent party the option whether to terminate (rescind) or carry on (affirm) the contract. On the other hand, a breach to perform within the time stipulated under s. 56(2) where time is not of the essence, the contract is not voidable and the innocent party is only entitled to compensation for the loss suffered as a result of the breach.

[30] Reverting to this present case, it is not in doubt that the PDA does not expressly state that time is of the essence. However, we note that the learned High Court Judge and the majority of the Court of Appeal concluded that it was implicit in the PDA that time was of the essence. We agree with their finding. As such s. 56(2) becomes irrelevant. It follows that Question 2 need not be answered.

[31] We also agree with the finding of the courts below that the assertion that the plaintiff was entitled to commence development at a time of its choice or at its own leisurely pace and the

argument that the plaintiff had the right to a further three years extension upon the expiration of the fifteen years period to be wholly untenable. Indeed, it would be commercially sensible to deduce that the parties had intended for the development process to be completed (or at least substantially completed) by the end of the fifteen year period. Here, nothing to that effect has been done. It is far from completion. In fact, it has not even commenced. And incidentally, it is trite that there is a *prima facie* acceptance that in commercial contracts, time would be of the essence (see: *Bunge Corp v. Tradax Export SA* [1981] 2 All ER 513; *Himatsing & Co v. PR Joitaram* [1970] 1 LNS 37). That rule, in our view, applies with even greater force in construction contracts. It can of course be rebutted if the parties indicate otherwise by words or conduct, but for a starting point, it must be assumed that the parties intended for time to be of the essence. It would not make much commercial sense if otherwise.

[32] Accordingly, it is our considered view that under the PDA, time was of the essence for the development to be commenced and completed within the fifteen years period, even though it does not set out in detail the stages in which the development is to be progressed upon. By its failure to commence any development activity over the Development Property, the plaintiff is guilty of a breach of the PDA. Section 56(1) applies and the defendants were entitled to terminate the PDA.

Question 3 – Effect Of s. 47 Of The Contracts Act 1950

[33] In view of our conclusion for Question 2 we need not have to address this Question 3. However for completeness we say that it is a common law principle that even where parties to a contract do not intend for time to be of the essence the promisor is still obliged to perform his obligation within a reasonable time. And it has been embodied in s. 47 which reads:

> **47. Time for performance of promise where no application is to be made and no time is specified.**
>
> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

> Explanation – The question "what is a reasonable time" is, in each particular case, a question of fact.

[34] However, in this case learned counsel for the plaintiff contended that since in this case there is already a time specified in the PDA, s. 47 has no application. In other words the common law of reasonable performance within a reasonable time does not apply.

[35] In response learned counsel for the defendants submitted that even if time was not of the essence in the PDA, s. 47 should apply. He went on to argued that 'the law of contracts in the common law world (unless the parties expressly agree otherwise) does not permit time to be at large, open-ended or indeterminate. Rather, the law is either that parties, expressly or impliedly, regard time as of the essence in which event s. 56(1) would apply, or do not intend that time to be of the essence in which event s. 47 would apply'.

[36] Now, in general we would say that there is merit in the argument of learned counsel for the plaintiff. However, on the facts and circumstances in this case such argument is untenable.

[37] Clause 1.1 in PDA provides:

> The New Developer grants the right to the Company to develop the Development property for a term of 15 years from the date of completion of the Acquisition Agreement upon the terms herein contained.

[38] The above clause could not reasonably be construed to allow the plaintiff to commence development only when the 15 years period is about to end. There is no other clause in the PDA or any other indication which would allow such construction or inference.

[39] Hence, we are more inclined to agree with the learned counsel for the defendants. In *Stickney v. Keeble* [1915] AC 386, Lord Atkinson clearly could not accept the argument which is somewhat similar to what was submitted for the plaintiff in this case. This is what the His Lordship observed:

> I feel, myself, quite unable to assent to the two propositions following, which, as I understood, were laid down by Mr. Hughes:

A (1) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale and purchase of land – though, indeed, it be measured by years – a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone.

(2) That where no time for completion is fixed in the contract and the law imports into it a provision that it is to be completed within a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him I apologize.

I think the authorities I have cited show that these propositions are untenable.

[40] Similar sentiment was expressed in *Sat Parkash L. Tara Chand v. Dr Bodh Raj L. Bhagwan Das Khatri* AIR [1958] Pun 111. The learned High Court judge in the course of discussing s. 46 (in *pari material* with our s. 47) the Indian Contracts Act 1872 said this:

As a result of the above discussion, I am definitely of the opinion that time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making times as of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract.

I am not prepared to agree that the only modes in which the time can be made of the essence of the contract are by express provision in the contract or by notice by one of the parties. *In my opinion, the law engrafts on the contract a condition that reasonable time in the absence of any specific time provided in the contract will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the parties, the said party will be deemed to be guilty of breach of duty or breach of contract.* (emphasis added).

[41] Accordingly, it is our considered view that even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By failing to take the necessary steps to commence development for thirteen and a half years, the plaintiff has indeed breached the PDA which justified the issuance of the termination notice.

Question 4 – Termination Notice

[42] Simply put, Question 4 disputes the validity of the termination notice issued pursuant to cl. 16 of PDA which entitles the plaintiff an opportunity to rectify the breaches complained of upon notice but was not afforded such opportunity in this case.

[43] Clause 16.1 provides:

> Termination
>
> In the event of a material breach of this Agreement by the Company the Landowner or the New Developer or both shall be entitled to give notice to the Company to rectify the breach within thirty (30) days of the issue of the notice and if the breach is not rectified by the end of thirty (30) days the Landowner and the New Developer shall be entitled to terminate this Agreement summarily and thereupon the Development Property shall revert back to the Landowner and the New Developer and the Landowner and the New Developer shall be entitled to take such steps and actions as shall be necessary to repossess the Development Property.

[44] Learned counsel for the plaintiff contended that there was no notice demanding rectification of the alleged breach prior to the termination notice. For such failure, it was argued that the termination notice was thus unlawful. And it was further contended that the defendants were wrong to assume that the plaintiff was unable to rectify the breach.

[45] In response learned counsel for the defendants submitted:

a. That the PDA would have automatically expired by 3 July 2009 and required no notice to trigger it. And no right for extension;

b. That cl. 16 is to terminate the PDA before the expiry date which only the defendants could exercise subject to there exist material breach. But issuance of such notice is neither obligatory nor a duty. It is up to the defendants whether to issue or not since the clause says "shall be entitled to give notice to rectify the material breach within 30 days";

c. That it would be impossible to rectify the total absence of development works within 30 days; and

A d. That the 'law does not impose on the defendants an obligation to state in the notice, which was given by letter dated 25 October 2007, to expire on 25 November 2007, that the plaintiff should rectify the material breach or at least commencing development on the development property simply B because that it would have been a practical impossibility.

[46] We are inclined to agree with the contentions of learned counsel for the defendants. Clause 16.1 does not create any obligation or duty for the defendants to issue a notice to the C plaintiff to rectify any material breach before termination notice can be issued. Notwithstanding, the termination notice did give a 30 days period before the termination took effect. As such the defendants did act in line with the PDA in the sense that they did not seek to terminate the PDA immediately but chose to state D that the PDA would be terminated upon the expiration of 30 days. In our view the complaint of the plaintiff is without merit. Hence, we are therefore satisfied that the termination notice is valid in law. Our answer to Question 4 is thus in the affirmative.

E **Question 5 – Implying Into The Contract That Time Is Of The Essence**

[47] In respect of Question 5 we are of the view that it has already been answered when we were addressing Questions 2 and 3 above. As such we do not think it is necessary for us to answer F this Question 5.

Question 6 – The Need To Plead That Time Is Of The Essence

G **[48]** At the outset we note that the issue raised in this Question 6 was not dealt with in the courts below. As such, strictly speaking, it should not be an issue before us. (See: *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51). However for the same reason H we gave in answering Question 1, we would thus proceed to consider this Question. Meanwhile, it is quite ironic that before us it is the plaintiff which is questioning the defendants of their reliance on the issue of time being the essence of the contract.

[49] Basically, it is the submission of learned counsel for the I plaintiff that the defendants did not plead time as being the essence of the PDA. As such, if indeed the defendants were

relying on an implied term that time was of the essence, this must necessarily be pleaded. Learned counsel cited the case of *Swarnam Ramachandran v. Jayapalan* [2004] 8 SCC 689 where the Indian Supreme Court said that 'the onus to plead and prove that time was of the essence is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of the essence.'

[50] In response, the learned counsel for the defendants argued that whether or not time was to be of the essence depended on the nature or subject matter of the contract and is to be inferred from the intention and conduct of the parties. It was therefore contended that the defendants have indeed sufficiently pleaded all this in their amended defence and therefore the plaintiff cannot now contend that they did not have notice of the defendants' intention to assert that time was of the essence of the PDA.

[51] Now, we are mindful of the rationale surrounding pleadings. The true purpose behind pleadings is so that the other side is not taken by surprise and is given the opportunity to rebut an assertion or an allegation at the earliest possible moment. It also helps to narrow down the issues to be tried. The issue therefore is whether the amended defence has sufficiently laid down the defendants' assertion that time was of the essence in the performance of the PDA.

[52] Having scrutinized the amended defence, we are inclined to agree with the defendants that they have sufficiently done so. For instance:

a. paragraph 19 states that the PDA 'clearly indicates that its essence is the undertaking by Damansara Realty (the plaintiff) of development on the Development Property during the 15 years term. Thus, development is a fundamental term of the PDA and goes to its roots';

b. paragraph 22 states that the 'development of the project by Damansara Realty was the *"raison d'etre"* of the PDA and because the development was going to be complex, it would take time: hence the 15 years term'; and

c. paragraph 23 states that the 'Defendants contend therefore that Damansara Realty (the plaintiff) is to procure that the development is not only begun, but also completed within the said 15 years term.'

[53] Accordingly, it is in our considered opinion that the defendants have sufficiently pleaded that time of performance is of the essence of the PDA. To accede to the plaintiff's argument would mean that the innocent party would have to expressly plead that 'time was of the essence of the contract', of which the law does not require. (See: *Superintendent of Lands and Surveys, (4th Division) & Anor v. Hamit Matusin & 6 Ors* [1994] 3 CLJ 567). We therefore hold that as long as the innocent party has sufficiently raised matters or facts which sufficiently show that time was of the essence that would be sufficient for the purposes of pleadings. We are further of the view that the plaintiff was not in any way taken by surprise or prejudiced by the omission of the defendants to plead the exact words.

[54] As such, our answer to Question 6 is in the negative since there is no legal requirement to plead the exact words saying that time was of the essence of the contract. As long as sufficient facts or matters have been pleaded to give rise to the same, this requirement would be complied with.

Other issues

[55] There are some other issues raised in the course of argument before us. However, we do not think we need to seriously address them since they do not form part and parcel of the Questions posed for our consideration. Nevertheless, for completeness we will briefly discuss them.

[56] Learned counsel for the plaintiff submitted that the main principle of law enunciated in *Berjaya Times Square Sdn Bhd (supra)* should be applied in this case. Learned counsel for the defendants opined otherwise.

[57] Whether or not an innocent party can treat the contract as having been repudiated is a question of fact. It depends on the facts and circumstances of each case. The main consideration is whether or not there has been a total failure of consideration. This can be derived from s. 40 of the Contracts Act 1950 where the words "his promise in its entirety" appear.

[58] In *Berjaya Times Square Sdn Bhd (supra)* it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although

not in its entirety. On the facts of that case the decision may be supportable. But we do not agree with the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled.

[59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as *Berjaya Times Square Sdn. Bhd (supra)*. This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.

[60] In fact in *Berjaya Times Square Sdn. Bhd (supra)*, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works. (See: *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666; *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213; *Law Ngei Ung & Anor v. Tamansuri Sdn Bhd* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44). As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.

[61] In any event, the factual matrix of *Berjaya Times Square Sdn. Bhd (supra)* is not in any way similar to the present case in which it is beyond doubt that nothing has been done towards the development of the land for the past thirteen and a half years from the fifteen years period. By contrast, in that case, the project was substantially completed at the due date. The remaining issue

A was whether the delay in completion (which was eventually completed) could give sufficient reason for the innocent party to terminate on the ground that the delay resulted in a fundamental breach going to the root of the contract. It was held that it did not warrant for termination. Another difference of that case with
B the present is the complaint there was premised based on the due date, whereas in the present case, the due date was one and a half years away. This brings us to our next point for discussion.

[62] The right of an innocent party to terminate a contract or
C treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach.

(See: *Civil Remedies in Malaysia (supra)* at p. 10 where the learned author states that the "grounds for discharge of a breach that
D amounts to (a) a repudiation and (b) a fundamental breach is used in the English text of *Cheshire, Fifoot and Furmston's Law of Contract*"). Thus, for academic purposes, those two grounds for discharge are treated as separate. Other texts have different classifications. Nevertheless, in reality, they often overlap with each
E other and it would serve not much purpose to distinguish them as separate heads. Be that as it may, it is generally accepted that repudiation is where a defaulting party has repudiated the contract before performance is due or before it has been fully performed, whereas a fundamental breach is where the promise which had
F been violated is one of major importance. (See: *Cheshire, Fifoot and Furmston's Law of Contract*, 15th edn, Oxford University Press at p. 681).

[63] The question at hand is what type of termination has been exercised in this case. The Court of Appeal seemed to have gone
G on the premise that the termination was made in an anticipated breach which was inevitable, or called an "anticipatory breach". With respect we do not think it is a clear-cut case. An anticipatory breach is where a fixed and exact date has been set for performance and one of the parties has indicated his refusal or
H displayed inability to perform his part of the bargain. Thus, in such circumstances, where it becomes apparent that a breach would be inevitable, the innocent party may be entitled to anticipate the said default and terminate the contract before it is due. This makes perfect commercial sense because the innocent party may proceed
I to make other necessary arrangements as may be required.

[64] However, the present case does not exactly fall under the category of an anticipatory breach *albeit* quite similar. In our opinion, the present case is more towards a situation where there has been a breach of a continuing promise. It is certainly a case of repudiation but also involves a fundamental breach of an existing obligation which gives rise to the inevitable conclusion that the promise or bargain would not be fulfilled by or on the due date. In this regard we need only refer to the English case of *Frost v. Knight* [1872] LR 7 Ex 111 where Cockburn CJ said the following:

> The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.
>
> On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

[65] And Cockburn CJ asserted that the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived and finally he observed as follows:

> The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

[66] It is therefore our considered opinion that a termination in anticipation of an inevitable breach is recognized under our law. It may be termed as termination upon an anticipatory breach (repudiation), or termination based upon a fundamental breach of an existing obligation (fundamental breach). For construction contracts, the latter would be more suited because it involves construction works over a period of time. The former is more suited for delivery of goods or contract for personal services. In any event, it is just a matter of terminology of which the modern day courts are not overly concerned with. In both circumstances, the innocent party is entitled to treat the contract as having been repudiated and may rightly treat itself as having been discharged from the contract. The innocent party has the option to rescind the contract (ie, rescission for breach) or to affirm the contract.

[67] A passage from *Civil Remedies in Malaysia (supra)* may make the point clearer where the learned author states the following at p. 14:

> It has been explained that "[a] contract is a contract from the time it is made, and not from the time performance is due". The promisee, while awaiting performance, is entitled to assume that the promisor will himself remain ready, willing and able to perform his side of the contract at the agreed date. *Any conduct by the promisor which destroys this assumption "is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future".* In *Frost v. Knight*, the defendant in retracting his promise to marry the plaintiff, violated not a future but an existing obligation. (emphasis added).

(See also: *Bradley v. Newsom Sons & Co* [1919] AC 16 per Lord Wrenbury)

[68] Hence, in our view the law does not require that the said inevitable breach must be of an absolute certainty but considers it on a reasonable and practical basis. (See: *Universal Cargo Carriers Corpn v. Citati* [1957] 2 All ER 70). We would add further that whether or not the conduct of the defaulting party (or would-be in default party) would justify the termination of the contract by the innocent party would depend on the nature of such conduct. In the present case, the conduct complained of is the prolonged delay. Where such delay would frustrate the commercial adventure the innocent party is entitled to treat the contract as having been

repudiated. (See: *Unitramp SA v. Garnac Grain Co Inc, (The Hermine)* [1979] 1 Lloyd's Rep 212). Such delay also goes to show that the defaulting party has either refused to perform or disabled himself from performing his promise in its entirety. In *Dr Parmanand v. District Board*, Patna AIR [1962] Pat 452 the High Court of India observed the following:

> The plaintiff was absent for over three years and nine months before the termination came under Ext. 4, and this period was long enough to show that the plaintiff either refused to perform or disabled himself from performing his promise in its entirety.

[69] Reverting to the present case we are of the view that the plaintiff's prolonged and unreasonable delay is one that frustrated the commercial adventure entered into by the parties. Such delay is also one that goes to show that the plaintiff had either refused to perform or disabled itself from performing its promise in its entirety. Whichever angle one looks at it, being from the viewpoint of repudiation or from a viewpoint of fundamental breach, the plaintiff remains in breach of the contract.

Conclusion

[70] Accordingly, for the above reasons we have given, it is our considered judgment that this appeal must be dismissed with costs.